APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED MAY 8, 2003

In the
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 02-3175

UNITED STATES OF AMERICA BY AND THROUGH JOSEPH E. GARST,

Plaintiff-Appellant,

v.

LOCKHEED-MARTIN CORPORATION, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 98 C 5072—**John F. Grady,** *Judge.*

ARGUED APRIL 14, 2003—DECIDED MAY 8, 2003

Before CUDAHY, POSNER, and EASTERBROOK, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* In 1990 the Department of Veterans Affairs chose Lockheed-Martin as the supplier of a new office automation system that was supposed to provide software, hardware, and services for database management and other services across a secure nationwide network. Lockheed performed under this contract between

1991 and 1997. Shortly after the VA replaced Lockheed with a different vendor, Joseph Garst, who used to work at the VA, filed this *qui tam* action on behalf of the United States. Garst alleged that Lockheed had violated the False Claims Act, 31 U.S.C. §§ 3729-33, by over-promising and under-performing, submitting fraudulent claims in the process. After reviewing Garst's allegations, the Department of Justice declined to take over the suit, leaving it in private hands.

Garst's complaint did not allege any specific fraud, leading Lockheed to move for its dismissal. (We use "Lockheed" as a collective description for all defendants, which include multiple corporate subsidiaries. Lockheed Martin Integrated Solutions Co., which performed the services under the contract, has been sold since 1997 to ACS State and Local Solutions, Inc., a subsidiary of Affiliated Computer Services, Inc., but Lockheed apparently retains all potential liability in this case.) Before the district court could act on Lockheed's motion, Garst filed an amended complaint. At 16 pages and 71 paragraphs, it was 50% longer than the initial complaint —but, the district judge concluded, no better. The court dismissed it for failure to plead fraud with particularity, 158 F. Supp. 2d 816 (N.D. Ill. 2001), a requirement that applies because the False Claims Act condemns fraud but not negligent errors or omissions. The district court observed that Garst had not given any specific example of a fraudulent claim. The judge permitted Garst to try again but reminded him of the need to allege "the who, what, when, where, and how: the first paragraph of any newspaper story." See *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990). The judge instructed Garst to file an organized and concise document.

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Garst's second amended complaint ballooned to 74 double-spaced pages with 198 paragraphs. Concise it was not. Before Lockheed could respond, Garst filed a third amended complaint, which broke the scale at 109 pages containing 345 numbered paragraphs; this document had 74 attachments, many of them lengthy. Lockheed asked the district judge to dismiss this complaint for failure to plead fraud with particularity, as Fed. R. Civ. P. 9(b) requires, and for the omission of any "short and plain statement of the claim", as Fed. R. Civ. P. 8(a)(2) contemplates. These rules are not in conflict: it is possible to write a short statement narrating the *claim*—which is to say, the basic grievance—even if Rule 9(b) requires supplemental particulars. But the district judge concluded that this complaint is so sprawling as to be essentially incomprehensible (a Rule 8 problem) and that despite the bloat it lacks details outlining fraud (a Rule 9 shortcoming). Instead of dismissing this complaint, the judge directed Garst to file a more definite statement. To make sure that Garst knew exactly what was needed, the judge explained that the statement "should be brief and should as to each count: (1) identify *specific* false claims for payment or *specific* false statements made in order to obtain payment; (2) if a false statement is alleged, connect that statement to a specific claim for payment and state who made the statement to whom and when; and (3) briefly state why those claims or statements were false" (underlining in original). Garst responded with 23 single-spaced pages plus 25 new attachments. The statement is loaded with so many acronyms and cross-references to the third amended complaint (plus its attachments) that no one could understand it without juggling multiple documents. Concluding that matters had taken a turn for the worse, the district judge threw

up his hands and dismissed the complaint, with prejudice, for Garst's inability or unwillingness to conform his pleadings to Rules 8 and 9. 2002 U.S. Dist. LEXIS 14307 (N.D. Ill. July 31, 2002).

The third amended complaint and statement together equate to 155 double-spaced pages and more than 400 numbered paragraphs, plus 99 attachments. You'd think that all this paper and ink would be enough to narrate at least one false claim. Yet Garst's appellate brief does not extract from the pleadings a single instance of a false statement made to obtain payment. A few selections from the "more definite statement" show why, after four years of overseeing Garst's efforts to plead a claim, the district judge's patience ran out. Here is the first paragraph of the "more definite statement," right under the caption "SPECIFIC FALSE OR FRAUDULENT CLAIMS FOR PAYMENT (SFCFP)" (a caption that shows Garst's love of inscrutable acronyms):

> Claim for $2,584,926.04, MDS Ex. 1, TAC Ex. 47, submitted on August 9, 1993 and related payments by T.A. Sieverson, Vice-President of Lockheed Integrated Solutions Company, Lockheed Corporation to VA Contracting Officer Steve Stapleton for equipment and service provided during Phase I and Phase II of the OA& MM/ISMS LAN/WAN PROJECT. See TAC ¶¶ 141-181, 217-243, 252, 280-282, 291-295.

The acronyms alone force readers to look elsewhere. MDS means "More Definite Statement" and "TAC" means "Third Amended Complaint." LAN is local area network, WAN is

wide-area network, and PROJECT appears to be the word "project" masquerading as an acronym. What "OA&MM/ISMS" might mean, we have not endeavored to discover. It is not defined anywhere in the more definite statement. To understand the paragraph one would have to read two exhibits and *seventy-seven* paragraphs scattered throughout the third amended complaint! This is simplification? Yet still one would not learn (a) what Sieverson said, (b) why it is false, and (c) what OA&MM/ISMS stands for. Paragraph 21 of the "specific false claims" reads: "All Lockheed invoices and payments within the statute of limitations following Lockheed purchasing tickets in excess of one thousand dollars for VA presidential appointees and senior executives, as detailed in TAC ¶ 55-Ex 5 and 6." This is specific? How does "[a]ll Lockheed invoices and payments within the statute of limitations" zero in on the fraud? And, once again, what were the statements and why were they false? Garst reveals in his appellate brief that, in his view, any claim for payment implies that the vendor has not violated any ethical rules and that by lobbying the VA's top officials Lockheed committed such violations. Why ethical problems (if any) equate to fraudulent claims is hard to see; at all events, the pleading defect is that Garst has made it so hard to grasp his point.

The second section of the "more definite statement" begins with the caption "SPECIFIC FALSE STATEMENTS OR RECORDS MADE IN ORDER TO OBTAIN PAYMENT". The first paragraph in this section reads:

> The total claims for the OA&MM LAN/WAN are fraudulent or false because Lockheed's cost estimate given to the VA's Stapleton was false

> because, to obtain the project task order, Lockheed told the VA that it could accomplish the OA&MM LAN/WAN statement of work for $1.2 million, a savings of $700,000 over the previously selected Banyan VINES configuration. Lockheed billed the VA for at least $2.6 million and never delivered a working LAN/WAN that met the contract requirements. Lockheed submitted the false cost statement to the NOAVA Contracting Officer (Stapleton). TAC ¶ 141, Ex. 41.

"NOAVA" stands for "National Office Automation for Veterans Affairs." VINES expands to "Virtual Integrated Network Services" but used in this paragraph is the name of a competitor's product rather than an acronym for a family of network protocols. What "the OA&MM LAN/WAN statement of work" might be is a mystery; perhaps Garst meant to say "segment of work." A contention that the "total claims" are false again fails the requirement of specificity. What did Lockheed say? This time Garst at least hints at a falsehood: Lockheed promised to do a task for $1.2 million and eventually billed $2.6 million without meeting contract requirements. (Other parts of the complaint and statement suggest that the shortcoming that most concerns Garst is Lockheed's inability to make the network secure enough for the transmission of military secrets, though an outsider might suppose that a database of pensions and health benefits does not require quite that degree of sophisticated encryption.) Yet failing to keep one's promise is just breach of contract, and cost overruns in government procurement projects may occur without fraud. To satisfy Rule 9(b), Garst had to allege that Lockheed said something knowing at the time that the

representation was false (or not intending to perform); failures to satisfy the customer *ex post* are not fraud, for as Judge Friendly remarked there is no "fraud by hindsight." *Denny v. Barber*, 576 F.2d 465, 470 (2d Cir. 1978). See also *Murray v. Abt Associates Inc.*, 18 F.3d 1376 (7th Cir. 1994). The VA hired Lockheed to solve problems. That Lockheed knew in advance that there *were* problems (the most charitable description of Garst's allegations), some of which turned out to be insuperable (by Lockheed's staff, at least), does not come close to alleging fraud with particularity.

We could go on with other paragraphs of the complaint and statement, but there would be little point to the exercise. Some come closer to specific allegations of deceit but fail to link them to any claim for payment. (Lockheed says that it swallowed some of the costs, and did not submit bills, when it realized that certain objectives could not be achieved.) But even if it were possible to navigate through these papers to a few specific instances of fraud, why should the court be obliged to try? Rule 8(a) requires parties to make their pleadings straightforward, so that judges and adverse parties need not try to fish a gold coin from a bucket of mud. Federal judges have better things to do, and the substantial subsidy of litigation (court costs do not begin to cover the expense of the judiciary) should be targeted on those litigants who take the preliminary steps to assemble a comprehensible claim. Garst's lawyer filed documents so long, so disorganized, so laden with cross-references and baffling acronyms, that they could not alert either the district judge or the defendants to the principal contested matters.

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Some complaints are windy but understandable. Surplusage can and should be ignored. Instead of insisting that the parties perfect their pleadings, a judge should bypass the dross and get on with the case. A district court is not "authorized to dismiss a complaint merely because it contains repetitious and irrelevant matter, a disposable husk around a core of proper pleading." *Davis v. Ruby Foods, Inc.*, 269 F.3d 818, 820 (7th Cir. 2001). But although "[f]at in a complaint can be ignored", *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998), "dismissal of a complaint on the ground that it is unintelligible is unexceptionable." *Davis*, 269 F.3d at 820. Length may make a complaint unintelligible, by scattering and concealing in a morass of irrelevancies the few allegations that matter. Three other circuits have held that length and complexity may doom a complaint by obfuscating the claim's essence. See *In re Westinghouse Securities Litigation*, 90 F.3d 696, 702-03 (3d Cir. 1996) (600 paragraphs spanning 240 pages); *Kuehl v. FDIC*, 8 F.3d 905, 908-09 (1st Cir. 1993) (358 paragraphs in "only" 43 pages); *Michaelis v. Nebraska State Bar Association*, 717 F.2d 437, 439 (8th Cir. 1983) (144 paragraphs in 98 pages). At 400 paragraphs covering 155 pages, and followed by 99 attachments, Garst's distended pleadings join that unsavory company. A concise statement of the claim illustrated by 400 concrete examples of fraud would be one thing, but 400 variations on the kind of paragraph we have quoted are quite another. Complaints like this are pestilential, and the district court showed great restraint in wading through four iterations plus one "more definite statement" before giving up. Garst received more judicial attention than his pleadings deserved.

Appendix A

AFFIRMED

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED JULY 31, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 98 C 5072

UNITED STATES OF AMERICA ex rel. JOSEPH E. GARST,

Plaintiff,

v.

LOCKHEED-MARTIN CORPORATION, et al.,

Defendants.

MEMORANDUM OPINION

Before the court is defendants' motion to dismiss the third amended complaint. For the reasons explained below, the motion is granted.

BACKGROUND

Joseph Garst (the "relator") is a former employee of the United States Department of Veterans Affairs (the "VA") who initiated this *qui tam* action against the Lockheed-Martin Corporation and other Lockheed-related entities (collectively, "Lockheed") under the False Claims Act (the "FCA"),

31 U.S.C. § 3729. This action seeks to recover damages and civil penalties on behalf of the United States arising from purported false or fraudulent claims for payment presented to the VA.[1]

We fully outlined the basic facts of this case, as alleged by plaintiff and taken as true for purposes of this motion, in our memorandum opinion of March 29, 2001. *See United States ex rel. Garst v. Lockheed Integrated Solutions Co.*, 158 F. Supp. 2d 816 (N.D. Ill. 2001). In sum, in 1990, the VA issued a Request for Proposal for a nationwide office automatic system for the VA. The project was known as NOAVA, an acronym that stands for Nationwide Office Automation—Veterans Administration. The VA awarded the NOAVA contract to Lockheed Integrated Solutions, a wholly-owned subsidiary of the Lockheed-Martin Corporation. Plaintiff claims that Lockheed defrauded the VA in relation to the NOAVA contract.

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1. The FCA authorizes private individuals to file suit against any entity alleged to have presented a false or fraudulent claim for payment to the federal government. *See* 31 U.S.C. § 3730(b). After these private individuals, known as "relators" or "*qui tam* plaintiffs," file their complaints under seal, the government then has an opportunity to investigate and decide whether to intervene. If the government decides not to intervene, the complaint is unsealed and the suit proceeds. The relator is entitled to a share of the proceeds if the action is successful, the amount depending, in part, on whether the government intervenes. If the government joins the suit, the relator is eligible to receive between fifteen and twenty-five percent of the judgment. Here, the government elected not to intervene, so the relator is eligible to collect twenty-five to thirty percent of the proceeds if the action is successful. *See* § 3730(d)(1), (2).

Appendix B

The relator has filed three previous complaints. His third amended complaint (the "complaint") contains ten counts, all arising under the FCA. The relator claims that Lockheed presented false claims to the VA, used false statements to get such false claims paid, used false statements to conceal an obligation to repay money to the VA, and entered into a conspiracy to defraud the VA. In addition, the relator alleges that Lockheed violated the Ethics in Government Act, 18 U.S.C. § 207(a)(2) and (c), and the Byrd Amendment to the Procurement Integrity Legislation, 31 U.S.C. § 1352(a)(1) and (b)(1).[2] The complaint alleges that the United States suffered actual damages in excess of $150,000,000.

Defendants brought this motion to dismiss on the grounds that the complaint fails to plead fraud with particularity and fails to state a claim under the FCA. On May 8, 2002, we directed the relator to file a more definite statement because it appeared that the complaint failed to comply with Federal Rules of Civil Procedure 8 and 9. After the relator filed a more definite statement, defendants

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2. The Ethics in Government Act essentially prohibits former government officials now acting as lobbyists from attempting to improperly influence their former employers. 18 U.S.C. § 207.

The Byrd Amendment to the Procurement Integrity Legislation prohibits federal contract recipients from using federal funds to pay lobbyists to influence executive or legislative decision-making in connection with a specific federal contract. The Byrd Amendment also requires that persons receiving a federal contract file certain disclosures and certifications regarding lobbying. 31 U.S.C. § 1352.

supplemented their motion to dismiss, and the relator responded to the supplement.[3]

DISCUSSION

Because the FCA prohibits entities from presenting to the government "false or fraudulent claims" for payment, the relator must meet the heightened pleading requirement of Federal Rule of Civil Procedure 9(b) that the alleged fraud "be stated with particularity." *United States ex rel. Robinson v. Northrop Corp.*, 149 F.R.D. 142, 145 (N.D. Ill. 1993). This has been taken to mean that the "who, what, when, and where" of the fraud must be pleaded. *See id.*

"[T]he particularity demands of pleading fraud under Rule 9(b) in no way negate the commands of Rule 8." *Vicom, Inc. v. Harbridge Merchant Servs., Inc.*, 20 F.3d 771, 776 (7th Cir. 1994). Pursuant to Rule 8(a)(2), a complaint must set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8(e)(1) requires each averment of a pleading to be "simple, concise, and direct." Taken together, these two requirements "underscore the emphasis placed on clarity and brevity by the federal pleading rules." 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1217 (2d ed.1990). The primary purpose of these provisions is rooted in fair notice; a "complaint must be presented with intelligibility

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3. The relator's motion to strike certain matter from defendants' motion to dismiss is denied as moot because we need not consider (nor have we considered) the portion of the motion to which the relator objects.

sufficient for a court or opposing party to understand whether a valid claim is alleged and if so what it is." *Wade v. Hopper*, 993 F.2d 1246, 1249 (7th Cir. 1993) (citation omitted).

In our memorandum opinion of March 29, 2001, we dismissed the relator's first amended complaint for failure to plead fraud with particularity as required by Rule 9(b) and for failing to state an FCA claim. We cautioned that "[a]ny amended complaint should meet the pleading requirements explained in this opinion." 158 F. Supp. 2d at 825. Since then, the relator has amended his complaint two times. The third amended complaint not only suffers from many of the same defects as the prior complaints, it is so needlessly prolix and confusing that it fails to comply with Rule 8. We recognize that the facts may be complex, but "[t]he necessity for complexity . . . does not give litigants license to plead by means of obfuscation." *Jennings v. Emry*, 910 F.2d 1434, 1436 (7th Cir. 1990). The third amended complaint is 109 pages and contains 345 paragraphs. It is an example of "shotgun" pleading, meaning that "it is virtually impossible to know which allegations of fact are intended to support which claim(s) for relief." *Anderson v. District Bd. of Trustees*, 77 F.3d 364, 366 (11th Cir. 1996). "It goes without saying that a plaintiff with a solid case does not need to file a shotgun complaint." *Byrne v. Nezhat*, 261 F.3d 1075, 1130 n. 108 (11th Cir. 2001).

The relator had yet another opportunity to set forth his claims in an understandable manner when we directed him to file a more definite statement. We warned him of our belief that the third amended complaint failed to comply with Rules 8 and 9. We also specifically directed: "The [more definite]

statement should be *brief* and should, *as to each count*: (1) identify *specific* false claims for payment or *specific* false statements made in order to obtain payment; (2) if a false statement is alleged, connect that statement to a specific claim for payment and state who made the statement to whom and when; and (3) briefly state why those claims or statements were false." (Order of May 8, 2002) (emphasis in italics added).

The more definite statement is far from brief; it is 23 pages long and has 27 exhibits. By and large, it fails to connect allegedly false statements to specific claims for payment, and it does not state intelligibly *why* each particular claim or statement is false. As defendants point out, the relator offers reasons why he believes *all* of the listed claims are false, rather than explaining why each specific claim is false as he was directed to do. While we might be able to laboriously parse the more definite statement to identify a valid claim complying with our previous orders, we are not required to do so. *See Jennings*, 910 F.2d at 1436 (a complaint must be presented with intelligibility and clarity "sufficient to avoid requiring a district court or opposing party to forever sift through its pages in search of . . . understanding" "whether a valid claim is alleged and if so what it is."). Moreover, the relator's use of "incorporation by reference" with regard to certain counts does not comply with our order to identify which allegedly false statements pertain to which count of the complaint.

One of the relator's own exhibits—a chart containing "extracts" of his "preliminary draft summary exhibit, prepared in anticipation of trial" (Response to Defendants'

Supplement at 12 & Enc. 3)—demonstrates the difficulty of identifying a valid claim. The chart contains a list of purported false claims and corresponding columns titled "specific false statements," "reason why claim is false," "third amended complaint paragraph," "third amended complaint exhibit," and "more definite statement exhibit," which identify the location of the relator's allegations in the listed documents. Instead of assisting us, however, the chart (and even the need for a chart) confirms our belief that laborious parsing of the complaint would be necessary.

"Despite receiving express directions about what they had to do, counsel did not do it. At some point the train of opportunities ends." *Guaranty Nat'l Title Co. v. J.E.G. Assocs.*, 101 F.3d 57, 59 (7th Cir. 1996) (citation omitted). We cannot imagine attempting to try this case to a jury on the third amended complaint; it simply cannot serve as an orderly basis for litigation. This court has given the relator the benefit of the doubt by granting him numerous opportunities to file a complaint that complies with the Federal Rules of Civil Procedure. He has failed to do so, and there is no indication that he might be able to state a valid claim. Therefore, this dismissal will be with prejudice.

CONCLUSION

For the foregoing reasons, defendants' motion is granted, and the relator's third amended complaint is dismissed with prejudice. The relator's motion to strike matter from defendants' motion to dismiss is denied as moot.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS DATED MAY 8, 2002 AND FILED MAY 10, 2002

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

Case Number 98 C 5072

U.S. ex rel. Joseph Garst

v.

Lockheed Integrated Solutions Co.

ORDER

Defendants have moved to dismiss plaintiff's third amended complaint. We have reviewed the 109-page third amended complaint, and we believe that the allegations are not simple, concise, or direct as required by Fed. R. Civ. P. 8(e)(1). We also believe that the third amended complaint fails to comply with Rule 9(b), which requires that all averments of fraud be stated with particularity. The separate, bare-bones counts alleged at the end of the third amended complaint are not connected with the factual allegations in a way that enables the court, or the defendants, to tell which allegations of fact are intended to support which claims for relief. Moreover, it appears that the third amended complaint suffers from many of the same defects as plaintiffs prior complaints, which we outlined in our memorandum opinion of March 26, 2001, granting defendant's motion to dismiss the amended complaint.

Appendix C

In lieu of dismissing the third amended complaint with prejudice and in the interest of expediting the resolution of this case, plaintiff is directed to file a more definite statement by May 29, 2002. *See* Fed. R. Civ. P. 12(e); *Anderson v. Board of Trustees*, 77 F.3d 364, 367 (11th Cir. 1996) (the court may require a more definite statement *sua sponte)*; 2 *Moore's Federal Practice* ¶ 12.36[1] (3d ed.1998) ("[C]ourts will occasionally order a more definite statement *sua sponte,* which they have the freedom to do."); *cf.* Fed. R. Civ. P. 16(c) (providing that the court may take appropriate action at pretrial conference with respect to the simplification of the issues). The statement should be brief and should, as to each count: (1) identify ecific false claims for payment or *specific* false statements made in order to obtain payment; (2) if a false statement is alleged, connect that statement to a specific claim for payment and state who made the statement to whom and when; and (3) briefly state why those claims or statements were false. As for the conspiracy allegations, plaintiff should specifically identify the alleged co-conspirators and describe the alleged agreement to defraud the government.

The court will consider defendants' motion to dismiss in light of plaintiffs more definite statement, and defendant is given leave to supplement its motion in light of the more definite statement, if it wishes, by June 12, 2002.

APPENDIX D — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED MARCH 26, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 98 C 5072

UNITED STATES OF AMERICA ex rel. JOSEPH E. GARST,

Plaintiff,

v.

LOCKHEED INTEGRATED SOLUTIONS COMPANY,

Defendant.

MEMORANDUM OPINION

Before the court is defendant's motion to dismiss the plaintiff's amended complaint. For the reasons explained below, the motion is granted.

Background

Joseph Garst is a former employee of the United States Department of Veteran Affairs ("VA") who initiated this *qui tam* action against Lockheed Integrated Solutions Company ("Lockheed") under the False Claims Act ("FCA"). *See* 31 U.S.C. § 3729 (West Supp.2000). The action seeks to

recover damages and civil penalties on behalf of the United States arising from alleged false or fraudulent claims for payment presented to the VA.

The following facts are drawn from Garst's amended complaint ("complaint"), which we take as true for purposes of deciding this motion. In 1990, the VA issued a Request for Proposal ("RFP") for a nationwide office automation system for the VA. The project was known as "NOAVA," an acronym that stands for Nationwide Office Automation—Veterans Administration. The VA awarded the NOAVA contract to Lockheed, a wholly owned subsidiary of Lockheed Martin Corporation, in 1990. Lockheed hired a subcontractor known as SSDS, Inc.

The RFP required that the NOAVA system be compatible with certain computer systems the VA had already purchased, in particular, the Integrated Supply Management System ("ISMS"), its financial module, PRISM, and a network operating system known as Banyan VINES. It also required that the NOAVA system meet certain security guidelines. Under the contract, the VA was obligated to purchase equipment for the NOAVA contract from Lockheed alone.

According to the complaint, Lockheed made false representations to the VA in order to obtain the NOAVA contract and then failed to deliver on its promises. Lockheed failed to advise the VA that the individual it had identified as bearing primary responsibility for overseeing the NOAVA contract was no longer with the company; Lockheed falsely represented that its system would be compatible with Banyan VINES and would meet the VA's security requirements;

Appendix D

Lockheed promised that its network operating system, PC-NFS, would work but it never did; Lockheed promised that its system would run ISMS and PRISM but the system was never able to do so in a manner that met the VA's needs; Lockheed represented that it would supply qualified data processing professionals to provide technical support, but supplied unqualified personnel; Lockheed promised to deliver "state of the art" computer hardware, but provided hardware that was behind the "state of the art"; Lockheed represented that it would provide hardware and software efficiently, but delivery was often very delayed and machines arrived without the necessary equipment to make them functional; Lockheed represented that it would pay liquidated damages when equipment was delivered late but never paid those damages; and Lockheed represented that it would provide hardware, software, and services at a competitive price but engaged in "rapacious pricing practices" which caused the VA to spend far more than the market price.

In 1993, Garst submitted a detailed memorandum to the Office of the Inspector General ("OIG") complaining of Lockheed's performance. The OIG conducted an audit of the NOAVA contract and issued a report in September of 1994, finding that the VA did not maintain records adequate to enable oversight of Lockheed's performance of the NOAVA contract or of Lockheed's pricing practices. The OIG report found that about three million dollars was paid to Lockheed in late payment penalties, in part due to deficiencies in Lockheed's billing practices. In addition, the OIG report found that the VA's contracting officer was not authorized to commit the VA to the large expenditures under the NOAVA contract.

Appendix D

Thereafter, Garst and others who complained about the "fraudulent aspects of the Lockheed NOAVA contract" suffered reprisals and were "removed from the communication loop concerning the NOAVA contract." Garst himself was forced out of the VA after he complained.

In 1998, Garst filed this complaint under the *qui tam* provision of the False Claims Act ("FCA"), which authorizes private individuals to file suit against any entity alleged to have presented a false or fraudulent claim for payment to the federal government. *See* 31 U.S.C. § 3730(b). After these private individuals, known as "relators" or *"qui tam* plaintiffs," file their complaints under seal, the government then has an opportunity to investigate and decide whether to intervene. 31 U.S.C. § 3730(b)(2). If the government decides not to intervene, the complaint is unsealed and the suit proceeds. The relator is entitled to a share of the proceeds if the action is successful, the amount depending, in part, on whether or not the government intervenes. 3730(b)(1), (d)(1) (if the government joins the suit the relator is eligible to receive between fifteen and twenty-five percent of the judgment). Here, the government elected not to intervene, so the relator is eligible to collect thirty to thirty-five percent of the proceeds if the action is successful.

The defendant brings this motion to dismiss on the grounds that: (1) the relator has not pled fraud with particularity; (2) he has not stated a claim under the False Claims Act; (3) and the six year statute of limitations on the only bill presented (June of 1992) ran before the complaint was filed in August of 1998.

Appendix D

Analysis

A. *Count I: Violations of § 3729(a)(1), (2), and (7).*

Because the FCA prohibits entities from presenting "false or fraudulent claims" for payment to the government, the relator must meet the heightened pleading requirement of Federal Rule of Civil Procedure 9(b) that the alleged fraud "be stated with particularity." *United States ex rel. Robinson v. Northrop Corp.*, 149 F.R.D. 142, 145 (N.D.Ill.1993). This has been taken to mean that the plaintiff must plead the "who, what, when, and where" of the fraud. *Id.*

Lockheed argues that the complaint fails to provide sufficient information to allow Lockheed to defend itself. For example, the complaint fails to identify what part of § 3729 the defendant violated and further fails to specify any claims for payment that Lockheed presented which were false or fraudulent. Moreover, Lockheed points out that the relator has failed to allege fraud with any particularity: the plaintiff has not identified any individuals who committed fraud, provided any specific dates, nor stated where the alleged fraud occurred.

In his Response, the relator does not identify the specific provisions of § 3729 that Lockheed allegedly violated, nor does he point to any particular false claims. The relator simply restates some of the general allegations in his complaint, relying primarily on his general claim that Lockheed induced the VA to enter into a $298 million contract with false promises about the quality of its equipment and technical expertise. As to Lockheed's argument that he has not pled

fraud with particularity, the relator responds that he cannot be expected to supply information that is within Lockheed's control, and that the requirements of Rule 9(b) should be somewhat relaxed in this case because of the ten year duration of the contract.

Because the relator does not dispute Lockheed's conclusion that he only intended to state claims for alleged violations of 31 U.S.C. § 3729(a)(1), (2), and (7) in Count I, we will analyze liability only under these subsections.

1. *§ 3729(a)(1) and (2)*

Under subsections (1) and (2), the relator must allege that the defendant knowingly presented a false claim for payment to the government, or that it presented a false statement or record in order to obtain payment. *See United States ex rel. Bustamante v. United Way/Crusade of Mercy, Inc.*, No. 98 C 5551, 2000 Westlaw 690250, at *4 (N.D. Ill. May 25, 2000) (setting forth the elements of § 3729(1) and (2) separately). Moreover,

> "[K]nowingly" means the person (or entity): (1) had actual knowledge of the falsity of the information at issue; (2) acted in deliberate ignorance of the truth or falsity of that information; or (3) acted in reckless disregard of the truth or falsity of the information. 31 U.S.C. § 3729(b). Innocent mistakes or negligence are not actionable under this section. [Citations omitted]. . . . In short, the claim must be a lie.

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Hindo v. University of Health Sciences, 65 F.3d 608, 613 (7th Cir.1995).

The defendant is correct that no specific false or fraudulent claims or records have been alleged. Only one claim for payment was alleged at all—a claim for $26,000 for 430 hours of work done to install Lockheed's network. But there is no allegation that the 430 hours of work billed was not actually done. *see id.* (finding that a claim was not fraudulent where there was no contention the work was not done), or that Lockheed knowingly misrepresented to the VA that its installation had been successful. *Cf. U.S. v. Hydroaire, Inc.*, No. 94 C 4414, 1995 WL 86733, at *4-5 (N.D. Ill. Feb. 27, 1995) (fraud was sufficiently alleged where the complaint stated that the defendant had certified that its product met the requirements of the contract and requested payment, but in fact the defendant knew the product was deficient).

The relator has cited no case for the proposition that he need not identify the false claims or records specifically, nor does he address the Seventh Circuit case cited by Lockheed, *Midwest Grinding Co., Inc. v. Spitz*, which held that dismissal of a fraud claim was proper where the plaintiff failed to identify the specific dates on which the defendant allegedly sent false invoices. 976 F.2d 1016, 1020 (7th Cir.1992).

Reading the complaint (together with his Response) in the light most favorable to the relator, his claim is that Lockheed induced the VA to enter into the $298 million contract by making numerous false promises on which it failed to deliver. Relator apparently believes it is unnecessary to allege the individual false claims or records because the

general allegations of overpricing for goods and services, assigning unqualified personnel to provide technical support, selling computers with a high failure rate, and designing a system which failed to meet the VA's needs, are sufficiently specific.

This sort of argument may apply in circumstances where the complaint alleges a very specific kind of false statement that appeared on every invoice submitted. *See United States ex rel. Johnson v. Shell*, 183 F.R.D. 204 (E.D. Tex.1998) (holding that the relators did not have to specify invoice numbers and dates where they alleged that each and every monthly royalty report was false in the same respect). Here, however, the relator attempts to allege various kinds of fraud occurring over a period of ten years. Further, it does not appear from the complaint that all the invoices submitted to the VA over the ten year duration of the contract were false or fraudulent. *See* Compl. ¶ 64 (referring to the "fraudulent aspects of the Lockheed NOAVA contract"). In such circumstances, it is appropriate to require that the relator describe the claims or records specifically and allege wherein they were false. *See United States ex rel. Clausen v. Laboratory of Am., Inc.*, 198 F.R.D. 560, 564 (N.D.Ga.2000) (dismissing FCA claim where the relator failed to allege any false claims or the dates on which they were submitted, and citing cases dismissing on the same grounds). In *Clausen*, a case where the relator alleged that the defendant performed unnecessary tests, the court observed that:

> [i]n essence, the Amended Complaint does not identify any specific claims that were submitted to the United States or identify the dates on which

> those claims were presented to the government. Instead, Plaintiff relies exclusively on conclusory allegations of fraudulent billing. Although Plaintiff's description of the fraudulent schemes in which Defendant allegedly engaged is set out in specific detail, performing these tests is not a violation of the FCA. Defendant could perform as many tests as it pleased as long as it only billed for the ones allowable under the applicable governmental program. Therefore, the fact that Defendant engaged in fraudulent testing, without sufficient allegations regarding the billing for these tests, does not allege a fraud claim with sufficient particularity according to Rule 9(b).

Id. at 564 (citing *U.S. ex rel. Hopper v. Anton*, 91 F.3d 1261, 1265-66 (9th Cir.1996) which held that "the Act attaches liability, not to the underlying fraudulent activity, but to the 'claim for payment.' "). The alleged fraud in *Clausen* took place over a ten year period of time, as it did here. "It is hard to imagine how Defendant can respond to an allegation that fraud was committed over a ten year period" without knowing the time that some of the false claims were submitted, much less what the false claims actually were. *Id.*

The relator cannot escape this conclusion simply by arguing that the specifics are "uniquely" within Lockheed's control. Response at 7. Any claims for payment were sent to the VA; Lockheed does not have exclusive possession of the claims or records presented. Any argument that the pleading standards should be lessened for *qui tam* plaintiffs because they do not necessarily have access to government records

has been rejected. *See Robinson*, 149 F.R.D. at 145 ("To apply a more lenient standard merely because the plaintiff was not the victim of the fraud and/or did not have access to all the facts, would be unfair to a defendant who may have to answer a complaint that would not be acceptable if the government had intervened in the action.").

Apart from the failure to plead any specific invoices, the relator's allegations fall well short because he has only alleged a laundry list of problems that Lockheed had in performing the contract. He has not alleged facts that would support an inference of fraudulent—rather than negligent—conduct on the part of Lockheed. The case of *U.S. v. Hydroaire, Inc.*, 1995 WL 86733, at *4-5, offers an instructive comparison. In that case, the government based its FCA action on the claim that defendant Hydroaire failed to deliver certain metallurgically bonded cylinders for use in Trident submarines as it had promised to do under the contract. The defendants made a motion to dismiss on the ground that the government did not plead fraud with particularity. Holding the complaint sufficient, the court observed that it alleged that (1) the contract entailed specific qualifications for the materials requested; (2) the defendant, Hydroaire, hired a company to produce the cylinders knowing that the company did not have the ability to produce the bond required under the contract; (3) Hydroaire was notified by a third party that the cylinders, in fact, did not meet the bond specifications required under the contract; and (4) at five different times, Hydroaire nevertheless presented a certificate stating its cylinders were in compliance with the contract and requested payment for them. *Id.* at *4. The complaint further stated the time frame in which Hydroaire was notified that the cylinders

did not comply with the contract (within a four-month window), and the specific dates on which a certificate of compliance was presented and the amount of payment requested. *Id.* at *4-5.

In comparison, the complaint here is bare. There is only one set of facts that even approaches the level of concreteness in *Hydroaire*, but even these facts are too sparse to sustain an FCA claim. The complaint alleges that the RFP required the contractor to deliver a system that would provide "C2" level security to protect sensitive proprietary and personal information, but an employee of Lockheed's subcontractor, SSDS, stated that "the most that Lockheed and SSDS were prepared to provide was security 'in the spirit of C2.' " Compl. at ¶ 51, 52. Nevertheless, Lockheed falsely represented to the VA that the system fully met its security requirements. *Id.* at ¶ 50. Unlike the complaint in *Hydroaire*, the complaint here fails to identify the SSDS employee, when or where the conversation with the SSDS employee occurred, when and where Lockheed's alleged misrepresentation occurred and who made it. *See also Robinson*, 149 F.R.D. at 146 (finding that plaintiff's allegations failed to provide supporting facts on which the allegation of fraud was founded where he failed to identify an employee specifically). More fundamentally, the complaint does not even state whether Lockheed ever requested payment on the basis of this false assertion, and if so, when.

There are no other allegations that Lockheed knowingly presented defective goods or services to the VA and attempted to pass them off as meeting the RFP requirements. Instead, the remaining allegations boil down to claims that Lockheed

failed to meet the terms of the contract. For example, the relator claims that Lockheed charged excessive prices for the goods and services it provided. But according to the complaint, the contract itself required the VA to purchase items from Lockheed "even when those products and services were priced substantially higher than the same or functionally equivalent items cost in the marketplace." Compl. ¶ 61 (complaining that Lockheed insisted on this contract). The only potential allegation of fraud is one that claims Lockheed often failed to provide the technical support for which the VA paid higher hardware and software prices. *Id.* at ¶¶ 47, 49. But unaccompanied by any particulars (such as invoice dates, times when service was refused, etc.) and absent any facts suggesting that Lockheed *knew* it could not or would not provide technical support, this allegation amounts to negligence or breach of contract, not a violation of the FCA. *See Hindo*, 65 F.3d at 613 (noting that knowledge is required under the FCA and that mistake or negligence is not enough); *see also Hopper*, 91 F.3d at 1265 (agreeing with the district court's analysis that "[i]t is not the case that any breach of contract . . . automatically gives rise to a claim under the FCA. . . . The FCA is far narrower. It requires a false claim.").

Because the complaint alleges no facts from which it appears that Lockheed requested payment or submitted records for payment of claims it knew[1] were false, we dismiss the claims that defendant violated section 3729(a)(1) and (2).

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1. According to paragraph 29 of the complaint, Lockheed and the VA negotiated a settlement as a result of Lockheed's failure to deliver a system that was compatible with the VA's ISMS project. Compl. ¶ 29. This tends to suggest that Lockheed acknowledged its failures under the contract.

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2. *§ 3729(a)(7)*

The relator's claim that Lockheed violated section 3729(a)(7) must fail for the same reasons. This section makes it unlawful for anyone to "knowingly make [ ], use[ ], or cause[ ] to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government."

The complaint alleges that Lockheed did not pay liquidated damages for late deliveries of hardware and software even though it had agreed to do so. Compl. at ¶¶ 36, 37, and 40. This is insufficient because there is no allegation that Lockheed avoided its obligation by lying to the VA. Indeed, the relator's Response brief shifts responsibility for this from Lockheed to the VA: "There is no indication of the VA charging Lockheed anything for its chronically late shipments to the VA, despite contract provisions that allowed the VA to do so." Response at 4.

The relator also argues that his complaint "alleges that Lockheed's misrepresentations and conspiracy prevented the government from obtaining default damages to which the VA was entitled." Response at 11. We find no allegation in the complaint that the VA was entitled to default damages or that Lockheed submitted records or statements to prevent these damages from being assessed.

Therefore, we dismiss the claim under § 3729(a)(7).

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B. *Count II*: *Conspiracy*

The relator claims that Lockheed violated § 3729(a)(3), which prohibits "conspir[ing] to defraud the Government by getting a false or fraudulent claim allowed or paid." The defendant argues that the relator's claim must fail because the complaint fails to identify any co-conspirator or any agreement to defraud, and therefore, Lockheed cannot draft a response. *See United States ex rel. Durcholz v. FKW Inc.*, 997 F. Supp. 1143, 1158 (S.D. Ind. 1998) ("An agreement among two or more person[s] is the essence of conspiracy.").

The relator responds that because conspiracies are secret by their very nature, he need only allege circumstances which support the inference that Lockheed conspired with others to defraud the government. He paraphrases a number of allegations in his complaint which criticize the VA's dealings with Lockheed,[2] and states that this "laundry list of instances

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2. The relator alleges the following facts are sufficient circumstantial evidence of fraud:

1) the VA entered into a mandatory purchase contract with Lockheed in the early to mid-1990s, a time when vendors were vigorously competing for business;

2) Lockheed was allowed to charge more than double the going rate for hardware at a time when prices were plummeting as technology advanced;

3) Lockheed was allowed to deliver older generation equipment even though it had promised state of the art wares;

(Cont'd)

in which Lockheed was given a pass go far beyond causal [sic] contracting practices and lead to the common sense conclusion that Lockheed entered into an agreement with one or more parties to defraud the VA in the NOAVA contract." However, these allegations are not obviously indicative of a conspiracy to defraud; they are as consistent with simple negligence on the part of the VA administrators as they are with the hypothesis of fraud.

(Cont'd)

4) Lockheed was given many more than the allowed number of chances to test its network solutions;

5) Lockheed was not held to the requirement that it provide C-2 level security;

6) Lockheed was never assessed liquidated damages when it missed delivery dates, even though the contract called for such damages;

7) Lockheed was not charged with default, even though it never delivered the integrated systems it promised;

8) the VA did not question the gap between the expertise Lockheed promised and the lack of knowledge of the personnel Lockheed actually put on the job;

9) this $298 million contract was administered by a contracting officer without the proper warrant;

10) Lockheed was not penalized for shipping hardware that didn't work instead of computers that Lockheed promised would be "many of the top-selling products in the marketplace." Response at 13-14.

Moreover, these allegations leave us to speculate at who was involved in this supposed conspiracy—does the relator mean to suggest that employees of the VA conspired with Lockheed to defraud the VA? There is only one VA employee mentioned by name—William Stapleton, the officer who oversaw the contract and who allegedly exceeded his authority in making payments to Lockheed. Compl. ¶ 59. Other allegations suggest that several upper-level employees of the VA took part in the supposed conspiracy. For example, the relator alleges that the VA took reprisals against individuals who complained about Lockheed's performance of the NOAVA contract, and that it also removed those employees from "the communications loop" about the NOAVA contract. Compl. ¶ 64. These and other general complaints about the behavior of unidentified VA personnel are insufficient to add up to conspiracy, particularly when the relator has not alleged any agreement or named parties to the agreement.

Next the relator argues that SSDS conspired with Lockheed to defraud the VA. However, there is no allegation in the complaint that SSDS was a co-conspirator, or that SSDS and Lockheed had any agreement to defraud the VA. The only allegation that might support an inference of fraud is that SSDS knew that it and Lockheed could not provide level C2 security that Lockheed had promised. However, the conspiracy must be one to "get a false or fraudulent claim allowed or paid" by the government, and as pointed out previously, there is no allegation that Lockheed or SSDS ever presented or attempted to present a claim for payment based on an assertion that they had delivered level C2 security.

Therefore, we dismiss the relator's conspiracy claim under § 3729(a)(3).

CONCLUSION

For the reasons stated above, the relator's complaint is dismissed without prejudice. We grant the relator leave to file an amended complaint by April 27, 2001. Any amended complaint should meet the pleading requirements explained in this opinion.

DATE: March 26, 2001

ENTER: s/ John F. Grady
John F. Grady, United States District Judge

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED JUNE 2, 2003

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 2, 2003

Before

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge

UNITED STATES OF AMERICA BY AND THROUGH JOSEPH E. GARST,

Plaintiff-Appellant,

No. 02-3175 **v.**

LOCKHEED-MARTIN CORPORATION, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.

No. 98 C 5072
John F. Grady, *Judge*.

Appendix E

Order

Plaintiff-appellant filed a petition for rehearing and rehearing en banc on May 22, 2003. No judge in regular active service has requested a vote on the petition for rehearing en banc,* and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

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* Chief Judge Flaum did not participate in consideration of this matter.

APPENDIX F — STATUTES INVOLVED

31 U.S.C.A. § 3729

Sec. 3729. False claims

(a) Liability for certain acts.—Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action,

or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined.—For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information—

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

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(c) CLAIM DEFINED.—For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

* * * *

31 U.S.C.A. § 1352

Sec. 1352.—Limitation on use of appropriated funds to influence certain Federal contracting and financial transactions

(a)(1) None of the funds appropriated by any Act may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any Federal action described in paragraph (2) of this subsection.

(2) The prohibition in paragraph (1) of this subsection applies with respect to the following Federal actions:

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(A) The awarding of any Federal contract.

(B) The making of any Federal grant.

(C) The making of any Federal loan.

(D) The entering into of any cooperative agreement.

(E) The extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(b)(1) Each person who requests or receives a Federal contract, grant, loan, or cooperative agreement from an agency or requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency, in accordance with paragraph (4) of this subsection—

(A) a written declaration described in paragraph (2) or (3) of this subsection, as the case may be; and

(B) copies of all declarations received by such person under paragraph (5).

(2) A declaration filed by a person pursuant to paragraph (1)(A) of this subsection in connection with a Federal contract, grant, loan, or cooperative agreement shall contain—

(A) the name of any registrant under the Lobbying Disclosure Act of 1995 who has made lobbying contacts on behalf of the person with respect to that Federal contract, grant, loan, or cooperative agreement; and

(B) a certification that the person making the declaration has not made, and will not make, any payment prohibited by subsection (a).

(3) A declaration filed by a person pursuant to paragraph (1)(A) of this subsection in connection with a commitment providing for the United States to insure or guarantee a loan shall contain the name of any registrant under the Lobbying Disclosure Act of 1995 who has made lobbying contacts on behalf of the person in connection with that loan insurance or guarantee.

(C) a request for or receipt of a loan, or a commitment providing for the United States to insure or guarantee a loan, that does not exceed $150,000, or the single family maximum mortgage limit for affected programs, whichever is greater, including a contract or subcontract to carry out any purpose for which such a loan is made.

(e) The Secretary of Defense may exempt a Federal action described in subsection (a)(2) from the prohibition in subsection (a)(1) whenever the Secretary determines, in writing, that such an

exemption is in the national interest. The Secretary shall transmit a copy of each such written exemption to Congress immediately after making such determination.

(f) The head of each Federal agency shall take such actions as are necessary to ensure that the provisions of this section are vigorously implemented and enforced in such agency.

(g) As used in this section:

* * *

(6)**(A)** The terms "Federal contract", "Federal grant", "Federal cooperative agreement" mean, respectively—

(1) a contract awarded by an agency;

* * * *

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18 U.S.C.A. § 207

Sec. 207.—Restrictions on former officers, employees, and elected officials of the executive and legislative branches

(a) Restrictions on All Officers and Employees of the Executive Branch and Certain Other Agencies.—

(1) Permanent restrictions on representation on particular matters.—

Any person who is an officer or employee (including any special Government employee) of the executive branch of the United States (including any independent agency of the United States), or of the District of Columbia, and who, after the termination of his or her service or employment with the United States or the District of Columbia, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia) in connection with a particular matter—

(A) in which the United States or the District of Columbia is a party or has a direct and substantial interest,

(B) in which the person participated personally and substantially as such officer or employee, and

(C) which involved a specific party or specific parties at the time of such participation,

shall be punished as provided in section 216 of this title.

(2) Two-year restrictions concerning particular matters under official responsibility.—

Any person subject to the restrictions contained in paragraph (1) who, within 2 years after the termination of his or her service or employment with the United States or the District of Columbia, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia), in connection with a particular matter—

(A) in which the United States or the District of Columbia is a party or has a direct and substantial interest,

(B) which such person knows or reasonably should know was actually pending under his or her official responsibility as such officer or employee within a period of 1 year before the termination of his or her service or employment with the United States or the District of Columbia, and

(C) which involved a specific party or specific parties at the time it was so pending,

shall be punished as provided in section 216 of this title.

* * *

(c) One-Year Restrictions on Certain Senior Personnel of the Executive Branch and Independent Agencies.—

(1) Restrictions.—

In addition to the restrictions set forth in subsections (a) and (b), any person who is an officer or employee (including any special Government employee) of the executive branch of the United States (including an independent agency), who is referred to in paragraph (2), and who, within 1 year after the termination of his or her service or employment as such officer or employee, knowingly makes, with the intent

to influence, any communication to or appearance before any officer or employee of the department or agency in which such person served within 1 year before such termination, on behalf of any other person (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of such department or agency, shall be punished as provided in section 216 of this title.

(2) Persons to whom restrictions apply.—

(A) Paragraph (1) shall apply to a person (other than a person subject to the restrictions of subsection (d))—

(i) employed at a rate of pay specified in or fixed according to subchapter II of chapter 53 of title 5,

(ii) employed in a position which is not referred to in clause (i) and for which the basic rate of pay, exclusive of any locality-based pay adjustment under section 5302 of title 5 (or any comparable adjustment pursuant to interim authority of the President), is equal to or greater than the rate of basic pay payable for level 5 of the Senior Executive Service,

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(iii) appointed by the President to a position under section 105(a)(2)(B) of title 3 or by the Vice President to a position under section 106(a)(1)(B) of title 3, or

* * * *